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No. 85-2045

In the Supreme Court of the United States

OCTOBER TERM, 1986

ANGEL M. COSME NIEVES, ET AL., PETITIONERS

v.

COL. ROBERT C. DESHLER, COMMANDING OFFICER, FORT BUCHANAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Petitioners contend that this action against a non-appropriated fund instrumentality of the United States and members of the United States armed forces for back pay and damages under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, was improperly removed to federal district court from the Superior Court of Puerto Rico. Petitioners also argue that the court below erred by rejecting their claims seeking back pay and damages under Puerto Rico local law.

1. Respondent Fort Buchanan Installation Club System (FBICS), a non-appropriated fund instrumentality of the United States, operates the Commissioned Officers' Open Mess and the Package Beverage Branch at the Fort Buchanan military base, which is located in Puerto Rico (Pet.

App. 25a).[1] The individual respondents were the commanding officers at Fort Buchanan (*id.* at 15a-16a & n.1, 26a n.2). Petitioners, employees of FBICS, commenced this action in the Superior Court of Puerto Rico alleging that respondents failed to pay proper wages and overtime, in violation of the relevant provision of the Fair Labor Standards Act, 29 U.S.C. 218, and the allegedly more beneficial provisions of Puerto Rico law. Petitioners sought back pay in the amount of $58,508.66 and additional penalties and liquidated damages. Pet. App. 26a.

Respondents removed the action to the United States District Court for the District of Puerto Rico and the district court denied petitioners' motion to remand (Pet. App. 9a-12a). The district court found that it had jurisdiction of the action under 28 U.S.C. 1337, that removal was proper under the general removal statute, 28 U.S.C. 1441(a), and that Congress had not expressly prohibited removal of actions under the Fair Labor Standards Act. The court of appeals denied petitioners' application for a writ of mandamus seeking review of the district court's decision denying their motion to remand (Pet. App. 13a). The district court subsequently granted respondents' motion to dismiss (*id.* at 15a-22a). It found that petitioners' employer was the United States and that, because petitioners sought more than $10,000 in back pay and damages, the action fell within the exclusive jurisdiction of the United States Claims Court. The court also ruled that "there is no justifiable basis for [petitioners'] assertion that the so-called 'more beneficial' [Puerto Rico] laws apply to federal employees" such as petitioners (*id.* at 21a).

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[1] A non-appropriated fund instrumentality is an entity that does not receive its monies by congressional appropriation and instead generates income primarily from its own activities. *Army & Air Force Exchange Service* v. *Sheehan*, 456 U.S. 728, 729-730 n.1 (1982).

The court of appeals unanimously affirmed in part and reversed in part (Pet. App. 24a-41a). It first concluded that petitioners were not required to bring this action in the Claims Court (*id.* at 28a-34a). Turning to the question of removal, the court of appeals noted that the FLSA provides that an action for back pay "may be maintained in any Federal or State court of competent jurisdiction" (29 U.S.C. 216(b)). The court observed that the general statute governing removal provides that removal is permissible "[e]xcept as otherwise expressly provided by Act of Congress" (28 U.S.C. 1441(a)) and held that the provision of the FLSA authorizing the maintenance of an action for back pay does not constitute such an express prohibition of removal. It stated that "[t]he words 'may be maintained' are ambiguous; at best they are suggestive. They are not an express provision barring the exercise of the right to removal. If Congress wished to give plaintiffs an absolute choice of forum, it has shown itself capable of doing so in unmistakable terms, and it could easily have done so here" (Pet. App. 36a (footnote omitted)).

The court of appeals also rejected petitioners' claim that they were entitled to back pay and damages under certain provisions of Puerto Rico law. It first held that the FLSA itself does not "incorporate existing state law; and it certainly does not guarantee [petitioners], as employees covered by the FLSA, the benefit of more favorable Puerto Rico laws that do not of their own force apply to federal employees" (Pet. App. 37a-38a). The court examined the Puerto Rico statutes relied upon by petitioners and concluded that the statutes did not apply to federal employees (*id.* at 38a-40a). It therefore affirmed the dismissal of petitioners' claims under those statutes.[2]

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[2]The court concluded that petitioners might be entitled to back pay under the FLSA standard applicable to employees of non-appropriated fund instrumentalities, 29 U.S.C. 218(b)(2). It directed the district court to consider this claim on remand. Pet. App. 40a-41a.

2. Petitioners' principal contention (Pet. 13-21) is that this action under the Fair Labor Standards Act was not removable to federal district court. The decision of the court of appeals rejecting this claim is correct and does not conflict with any decision of this Court. Furthermore, the decision does not present a conflict with a decision of another court of appeals warranting review by this Court.

a. The general removal statute states in pertinent part that "[e]xcept as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed * * * to the district court" (28 U.S.C. 1441(a)).[3] The statute that is the basis of petitioners' claim, the Fair Labor Standards Act, provides that "[a]n action to recover [the damages authorized by the Act] may be maintained against any employer * * * in any Federal or State court of competent jurisdiction" (29 U.S.C. 216(b)). This provision simply creates a cause of action that may be asserted in either state or federal court; it does not by its terms restrict the removal of an action to federal court and, therefore, does not constitute the express statutory prohibition needed to preclude removal. Compare, *e.g.*, 15 U.S.C. 77v(a) (cases brought in state court under Securities Act of 1933 "shall [not] be removed to any court of the United States"). As the court below concluded, "[t]he words 'may be maintained' are ambiguous; at best they are suggestive. * * * If Congress wished to give plaintiffs an absolute choice of forum, it has shown itself capable of doing so in unmistakable terms, and it could easily have done so here" (Pet. App. 36a (footnote omitted)).

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[3]The Superior Court of Puerto Rico constitutes a state court for purposes of this provision. *Kane* v. *Republica De Cuba*, 211 F. Supp. 855, 856 (D.P.R. 1962).

Petitioners rely upon *Johnson* v. *Butler Brothers*, 162 F.2d 87 (8th Cir. 1947), which addressed the removability of an FLSA action under the previous version of the general removal statute. That statute did not specify the standard for determining whether removal of an action was prohibited; in particular, the statute did not state that an action was removable "[e]xcept as otherwise expressly provided" by Congress (see 28 U.S.C. (1946 ed.) 71). The court of appeals in *Johnson* found that Congress had failed "clearly and accurately to express its intent" regarding removal, but ultimately concluded that Congress intended to bar removal of FLSA actions under the general removal statute (162 F.2d at 89).

The court below—the first court of appeals to address this issue since the revision of the removal statute in 1948—concluded that the new statutory standard, specifying that removal is permitted in the absence of an "express[ ]" provision to the contrary, distinguished the present case from *Johnson* and justified a different result. Pet. App. 35a-36a; see also *Baldwin* v. *Sears, Roebuck & Co.*, 667 F.2d 458, 460 n.4 (5th Cir. 1982) (holding that actions under the Age Discrimination in Employment Act—which contains language similar to the FLSA—are removable; court declined to follow *Johnson* on the ground that the 1948 revision of the removal statute put "the removability of FLSA actions in a very different light"). That determination is in accord with the weight of district court decisions regarding the issue. See, *e.g.*, *Taylor* v. *Brown*, 461 F. Supp. 559 (E.D. Tenn. 1978); *Hill* v. *Moss-American, Inc.*, 309 F. Supp. 1175 (N.D. Miss. 1970); 14A C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3729, at 495-496 (2d ed. 1985); but see, *e.g.*, *Bintrim* v. *Bruce-Merilees Electric Co.*, 520 F. Supp. 1026 (W.D. Pa. 1981). In view of the change in the terms of the removal statute after the

decision in *Johnson*, the decision of the court below does not create a conflict warranting review by this Court.[4]

b. The decision of the court below upholding the removal of this action is correct for the additional reason that—entirely apart from the removability of FLSA actions as a general matter—respondents were entitled to remove this action to federal court because of their status as federal officials.[5] Congress has specifically provided that a civil action against "[a]ny officer of the United States" or "a member of the armed forces of the United States" relating to acts done under color of office may be removed to federal district court (28 U.S.C. 1442(a)(1), 1442a). This ground for removal is not dependent upon the subject of the plaintiff's claim. *Ibid.*; cf. *Venable* v. *Richards*, 105 U.S. 636 (1881). Since the individual respondents are members of the United States armed forces, they plainly were entitled to remove the action to federal district court on this ground.

3. Petitioners also contend (Pet. 21-25) that the court below erred in concluding that certain Puerto Rico statutes do not apply to employees of the federal government. The first group of provisions cited by petitioners, which set forth minimum wage requirements, plainly are inapplicable here because "[p]ersons employed by the Government of the

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[4]Petitioners also rely (Pet. 20-21) upon a passage in a 1958 Senate committee report stating that FLSA actions are not removable. But, as the court of appeals noted (Pet. App. 36a n.18), the statute to which the report related concerns the removability of state workmen's compensation actions and did not amend either the general removal statute or the FLSA. The statement in the report therefore is not probative of Congress's intent in enacting either of the latter statutes. Petitioners' citation (Pet. 19-20 & n.5) of *American Fire & Casualty Co.* v. *Finn*, 341 U.S. 6 (1951), is inapposite because that case does not relate to 28 U.S.C. 1441(a), the portion of the removal statute at issue here.

[5]The district court did not address this ground for removal because it rested its decision on the general removal statute (Pet. App. 10a & n.1).

United States of America" are specifically excluded from their coverage (P.R. Laws Ann. tit. 29, § 246e(a)(2) (1985)).[6]

Provisions in the second group, which relate to working hours and overtime pay, do not contain an express exclusion for federal employees, although employees of the Commonwealth of Puerto Rico are exempted (P.R. Laws. Ann. tit. 29, § 285 (1985)). The court of appeals noted that the Department of Labor and Human Resources of the Commonwealth of Puerto Rico has issued two opinion letters stating that the exemption provision extends to federal employees as well. The court correctly concluded that "[i]n the absence of any Commonwealth court decision discussing the applicability of [the] exemption provision to federal employees," it was appropriate to adopt the Department's view. Pet. App. 39a; see also *id.* at 20a-21a (district court opinion).[7] Review by this Court of this question of Puerto Rico law is unwarranted.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1986

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[6]Petitioners argue (Pet. 22-23) that this express statutory exemption should be ignored because the Puerto Rico legislature was required to exempt federal employees from the statute until the FLSA was amended to apply to federal employees until 1974. Granting all of petitioners' premises, their argument is fatally defective because the Puerto Rico legislature revised this statute in 1979 and did not eliminate the exclusion for federal employees. See 1979 P.R. Laws 266.

[7]Petitioners' contrary argument (Pet. 24-25) is based upon their apparent belief that Puerto Rico may not choose to exempt federal employees from these statutory requirements. As the court of appeals noted (Pet. App. 37a-38a, 39a-40a), this position is obviously incorrect because nothing in the Constitution or the FLSA bars Puerto Rico from making such a choice.